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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1935

No. [redacted] 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

Appeal From the Supreme Court of the State of Washington

(184 Wash. 648, 52 Pac. (2d) 1274)

Brief of Appellant

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(a) The tax is not imposed for nor limited by the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies to pay the expenses incurred by the Department in regulating them all, in the aggregate; and 21-34

(b) The tax is imposed on railroad companies and a variety of other unrelated utility companies to pay the expenses of all of the duties and activities of the Department of Public Works, whether regulatory and supervisory in their nature, or administrative, police or judicial, and whether or not such activities have any relation to the business of the respective taxpayers. 35-39

II. The Act is void because its operative effect upon the appellant has been to create a commingled fund from the fees paid by railroads and other public utility corporations and other receipts of the Department, far in excess of the expenditures of the Department, and to make it impossible to determine the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utilities, or separately from the expense of the non-regulatory activities of the Department concerning railroads.

(a) The burden of proof was on the State to show that the fees collected from the railway companies under the act were not in excess of the reasonable cost of their regulation and supervision;

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(b) This burden of proof was not met because the only competent evidence in the record, consisting of the official reports of the Department of Public Works and the Governor of the State, shows that a large surplus was collected by the Department under the act and from other sources provided by law and commingled in one common fund, so that it was impossible to determine the expense of regulating and supervising railroads; 49

(c) The only evidence opposing this conclusion was that of the Auditor of the Department of Public Works, which was inadmissible and incompetent under all rules of evidence and was so held by both the trial court and the State Supreme Court, but was nevertheless made the basis of the State Supreme Court's holding "that the evidence preponderated against the findings made by the trial court" as to the cost of supervising and regulating railroads;

(d) This court will examine the State Supreme Court's finding to see whether it has substantial support in the evidence. So examined it discloses the lack of any support whatsoever. 54-56

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 878

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

Appeal From the Supreme Court of the State of Washington

(184 Wash. 648, 52 Pac. (2d) 1274)

Brief of Appellant

STATEMENT OF THE CASE

This is an action by the appellant Railway Company to recover an alleged excess of fees exacted by the State and paid under protest by the appellant to the State Department of Public Works, sometimes called the Public Service Commission. Upon a trial by the court findings of fact and conclusions of law were made, based upon which the court entered judg-

ment for appellant. Upon appeal to the Supreme Court of the state this judgment was reversed (184 Wash. 648, 52 Pac. (2d) 1274), and petition for rehearing was denied. (Tr. 85-101.)

The statute of the State of Washington, the validity of which is involved in this case, is Chapter 107, Washington Session Laws of 1929 (Remington's Revised Statutes, Section 10417). The pertinent provisions thereof are:

"Chapter 107.

(H. B. 200.)

Fees Required of Public Utility Companies.

AN ACT relating to public utility companies, providing for increased fees and amending Section 1 of Chapter 113 of the Laws of 1921, as amended by Section 1 of Chapter 107 of the Laws of 1923 (Section 10417 of Remington's Compiled Statutes).

Be it enacted by the Legislature of the State of Washington:

Section 1. That section 1 of Chapter 113 of the Laws of 1921, as amended by section 1 of chapter 107 of the Laws of 1923 (section 10417 of Remington's Compiled Statutes) be amended to read as follows:

Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a

statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: *Provided*, That the fee so paid shall in no case be less than ten dollars."

Section 2 of Chapter 113, Laws of 1921, which remained in effect with the foregoing amendment of Section 1, reads as follows:

"Sec. 2. All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the State treasurer, and by him deposited in a fund to be known as the public service revolving fund."

On March 9th, 1934, appellant Great Northern Railway Company, a corporation, filed its amended complaint in the Superior Court of Thurston County, Washington, to recover from the State of Washington the annual fees paid under protest to the Department of Public Works of Washington under Chapter 107, Laws of 1929, for the calendar years 1929 to 1932, inclusive. At the trial it was stipulated that the fee for the year 1933, which was also paid under protest, should be included in the action. The amended complaint also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under Chapter 227, Laws 1929, but at the trial the appellant did not question

the validity of those statutes. The issue was thus limited to the constitutionality of Chapter 107, Laws of 1929.

The amended complaint demanded a money judgment of $24,162.80, the total annual fees paid by appellant under Chapter 107, Laws 1929, for the calendar years 1929 to 1932, inclusive, together with interest; the amendment made by stipulation at the trial increased the amount demanded by $3,137.05, the fee paid by appellant for the calendar year 1933, together with interest; but by the withdrawal by appellant of its attack upon the prior statutes, the amount in controversy was reduced to $20,946.97 for the five calendar years 1929 to 1933, inclusive, plus interest, a total of $25,466.47. Appellant was granted judgment for this amount, together with its costs, against appellee in the Superior Court of the State of Washington for Thurston County on the first day of April, 1935. (Tr. 54.)

The amended complaint attacked Chapter 107, Laws of 1929, whether considered as imposing an occupation or excise tax or as imposing an inspection or regulatory fee. After the commencement of the suit the Supreme Court of the State held that the act imposes a regulatory or inspection fee, not an occupation or excise tax. See *Pacific T. & T. Co. v. Seattle*, 172 Wash. 649, 21 Pac. (2d) 721, affirmed

291 U. S. 300. In that case it was also held by the State Supreme Court that the fund created by the fees paid under Chapter 107, Laws 1929, is solely for the purpose of defraying the expenses attendant upon the administration of the Public Service Commission law of the State. In view of this holding, which defined the fee under attack as one to pay the expense of regulation and supervision, many of the allegations of the amended complaint became irrelevant.

Paragraph XV of appellant's amended complaint (first cause of action), however, is especially directed to the point that the act is invalid as an inspection or regulatory fee. This paragraph alleges:

"XV.

Under the Public Service Commission Law (Chapter 117, Session Laws 1911, Sections 10339 to 10490, inclusive, R. C. S., as amended) and under other laws of this state, the Department of Public Works exercises jurisdiction over and supervision of many classes of public utilities, including common carriers by rail, railroads operated by electricity, street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, carriers by water, and many other activities wholly disconnected from and unrelated to its duties of inspection and supervision of common carriers by railroad, and is charged with the performance of a variety of duties, other than those pertaining to inspection and supervision of common carriers by railroad under the police power of the state. If Chapter 113, Session Laws of 1921, Chapter 107, Session Laws

of 1923, and Chapter 107, Session Laws of 1929, or any of them, be construed as imposing a fee for supervision and inspection, then said statutes, and each of them, do not restrict the fee to be paid by plaintiff or other common carriers by rail, to the cost of legitimate regulation or supervision, nor is such fee based upon the proper cost or expense thereof, but the same is a flat fee of a percentage of gross revenue levied upon carriers by rail, and other corporations, for the purpose of paying the expense of supervising and inspecting a variety of independent and unrelated corporations, as above alleged, and for the purpose of paying the expense of performance of a variety of unrelated duties, including the expense of performing duties and discharging functions which properly pertain to inspection, supervision and regulation, and many expenses of performing duties and discharging functions, such as business and policing expenses, the expense whereof cannot be imposed upon common carriers by rail, including plaintiff, as legitimate expenses of supervising, inspecting and regulating such common carriers by rail. The fee or tax provided by said Chapter 107, Session Laws of 1929, and the other statutes hereinbefore mentioned, is grossly in excess of the reasonable cost of inspection and supervision of common carriers by rail. Plaintiff is informed and believes, and alleges that there has been accumulated from the fees paid under said acts, up to and including the first of January, 1933, the sum of more than $250,000 in excess of the amount expended by the Department of Public Works in the discharge of its manifold duties and functions under the laws of this state. Said fee or tax is not a reasonable or legitimate inspection or supervision fee or tax, but said statutes, and each of them, are in truth and in fact, revenue measures. The taxes imposed by and under said statutes are made payable into the public service revolving fund, which fund is a general state fund, subject to withdrawal for various and sundry expenses of the state, and not solely de-

voted by law to the expense incurred by the Department of Public Works in the performance of its duties of inspection or supervision of common carriers by rail, or other corporations or businesses subject to its jurisdiction. Said fee or tax, if construed to be a supervision or inspection fee or tax, is, and constitutes a burden on, and regulation of, interstate commerce in violation of Section 8, Article 1 of the Constitution of the United States, is capricious, arbitrary, excessive and unreasonable, and is discriminatory and unequal, denies to plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 3 and 12, and Article VII, Sections 1, 2 and 3 of the State Constitution." (Tr. 12-14.)

Appellee's answer admitted the payment by appellant of the annual fees under protest; admitted "that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the State of Washington, and that property belonging to plaintiff in the State of Washington is assessed upon an *ad valorem* basis for taxation like other property within the State;" admitted appellant's corporate status and capacity to sue, but denied substantially all other allegations of the amended complaint. (Tr. 34, 35.)

The trial court made detailed findings of fact and conclusions of law. (Tr. 37-54.) The trial court's findings show that, under the public service commission law and other laws, the Department of Public

Works exercises jurisdiction over many classes of public utilities, including common carriers by rail, electric and street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, and carriers by water, with respect to which it exercises many regulatory and supervisory duties; that the Department also has many other important duties wholly unrelated to its duties of inspection and supervision of railroads and other utilities, including the duty, prescribed by Sec. 10394, Remington's Revised Statutes, to take part in litigation before the Interstate Commerce Commission with respect to interstate rates; that the Department is constantly engaged in such litigation and incurs large expense, as may be seen from its annual reports in evidence; that the Department takes sides and participates in such litigation, sometimes on the side of the carriers operating in this State, and at other times against them, and sometimes in favor of some carriers in the State and against others operating in the State; that under Sections 10433 and 10434, Remington's Revised Statutes, the Department acts judicially in ordering refunds of alleged overcharges—a prolific source of litigation and expense, as may be seen from the annual reports; that Section 10442, Remington's Revised Statutes, provides for litigation to enforce the orders of the De-

partment, which is also a source of considerable expense; that in none of these activities does the Department exercise supervisory or regulatory authority of which the cost can be charged to railroads. (Tr. 45-48.)

A summary of the principal statutes prescribing the duties of the Department is printed herein as Appendix A.

The trial court further found that upon taking effect of Chapter 107, Laws 1929, the legislature made no further appropriation for the expenses of the Department's activities from the general fund until 1933; that all expenses of the Department's activities during this period were paid only from the fees paid under Chapter 107, Laws 1929, and the fees imposed upon other businesses subject to the jurisdiction of the Department; that the accumulation of the Department's receipts over the period 1929 to 1933, inclusive, resulted in a surplus of $224,193.95 in the Department's fund at the end of 1933; that the receipts of the Department from all sources were in excess of its expenditures during that period by said amount; that, however, no separate accounts were kept or required to be kept, and it was therefore impossible to determine the expense of regulating and supervising railroads separately from the expense

of regulating and supervising other public utilities. But the court found that the activities of the Department connected with the regulation and supervision of railroads were at all times relatively unimportant, in comparison with the time devoted to, and the cost incurred by, the Department in regulating and supervising auto transportation companies and motor vehicle operations, and its activities relating to and expenses incurred in the regulation and supervision of telephone, electrical, gas, water and public utility corporations, other than railroads, and in its non-regulatory activities relating to railroads. The court further found that the above mentioned surplus of $224,193.95, accumulated between 1929 and 1933, was expended by the Department in 1934 in carrying on investigations of, and litigation with, public utility corporations other than railroads. (Findings VIII and XI, Tr. 45, 48-49.)

Appellant's main contention in the Supreme Court of the State of Washington was that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expense of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed,

both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the Department of Public Works which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

The Washington Supreme Court overruled this contention on the stated ground that nothing appears on the face of the act to indicate that it is unconstitutional and that it "must * * * be presumed that from the information possessed by it, the legislature concluded that the amount of the fees as determined by the prescribed rates of percentage was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

The court next considered respondent's second contention that the invalidity of the act was established by evidence of its practical operation. It held that the burden of proof was on the appellant to show that the fees collected from the railroads under the act exceeded the cost of their regulation and supervision. It stated that a vast amount of supervision and regulation was necessary. But it made no refer-

ence to appellant's principal contention on this feature, viz., that the expense incurred in relation to railroads was largely of a non-regulatory character, such as conducting litigation before the Interstate Commerce Commission in the interest of shippers of the State of Washington, hearing reparation claims and other matters. The findings of the trial court go into these features in detail. They show that the Department performs many "duties and functions relating to railroads of a non-supervisory and non-regulatory nature." The Washington Supreme Court made no segregation of the cost of these activities from the cost of proper supervisory activities, but contented itself with the general holding that "in the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion."

Finally, the Washington Supreme Court held that even if the State had the burden of proving that the fees collected from the railroads of the state under Chapter 107, Laws of 1929, did not exceed the cost of their proper supervision and regulation, the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads. The findings of the trial court were based upon the annual reports of the Department of Public Works, made to the Governor as required by

law. The evidence held by the Supreme Court to preponderate against these findings was that of the Auditor of the Department of Public Works, who testified that at his personal request, and not as a matter of official duty, the various employes of the Department handed him time slips, showing the estimated time they devoted each month to the respective classes of utilities, and that this apportionment showed that the cost of "the railroad part of the Department of Public Works" exceeded the amount of the fees imposed upon the railroads by the act of 1929. The time slips turned in monthly by the employes "took no account of the kind of work they were doing as to the regulation of railroads." It was admitted that these records were "not official in the sense of any rule or order of the Department that required them to be kept." The Auditor confessedly had no knowledge of his own whether the figures turned in by the employes were correct (Tr. 76). The evidence of the Auditor was admitted after the case had been reopened to permit its introduction, and over appellant's objection that the evidence was hearsay (Tr. 74.) The trial court viewed the evidence as immaterial but admitted it because he "didn't want the case to come back here." The State Supreme Court held that "while the account kept by the Auditor was not official, in the sense that, of itself, it was admissible in

evidence, yet what the Auditor did in that respect qualified him to testify as to the ultimate fact." (Tr. 104-106.)

While the State Supreme Court disagreed with the trial court's legal conclusions, it did not disagree with the trial court's findings of fact, except in the general holding that "without further detailing the evidence, we will say that in our opinion, and insofar as there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads." (Tr. 91.)

SPECIFICATION OF ERRORS RELIED UPON

(1) The Supreme Court of the State of Washington erred in overruling appellant's contention that Chapter 107, Laws of 1929, is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties

and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

(2) The Supreme Court of the State of Washington erred in holding that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities."

(3) The Supreme Court of the State of Washington erred in holding that although Chapter 107, Laws of 1929, imposes a flat fee on railroad companies and many unrelated utility companies as well, to pay the expenses of regulating them all in the aggregate, and also the expenses of any and all duties and activities of the Department in connection with railroads and other utility companies,—many of which are not of a regulatory or supervisory nature,—the burden of proof was on the appellant to show that the fees collected from the railroads exceeded the cost of their regulation.

(4) The Supreme Court of the State of Washington erred in holding and deciding that the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads, viz:

(a) that it is not, and has not been, possible to separate and compute the cost of performance by the Department of Public Works of its supervisory and regulatory duties relating to railroads from the cost and expense of its supervisory and regulatory duties relating to telephone and telegraph, electrical, water, gas and other public utility corporations; (Finding of Fact IX).

(b) that in addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is

impossible to determine the same, and no attempt was made to do so on the trial of this case; (Finding of Fact X).

(c) that the Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony, and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff; that the Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case; (Finding of Fact X-B).

(d) that said Chapter 107, Laws of 1929, and the fee imposed thereby on railroad companies, including plaintiff, is in fact a revenue measure intended to impose, and which does impose, upon railroads and other utility corporations the cost and expense of regulating and supervising railroads and other utility corporations, and to defray the cost and expense of all of the activities of the Department, whether or not of a regulatory and supervisory nature, and the

excess collected over expenditures reverts to and is a part of the general funds of the state. (Finding of Fact XII.)

(5) The Supreme Court of the State of Washington erred in ignoring the uncontradicted evidence that the expense incurred by the Department of Public Works in relation to railroads, and defrayed by the fees imposed upon appellant and other railroads by Chapter 107, Laws of 1929, is largely caused by activities of a non-regulatory character, the expense of which has not been and cannot be segregated or determined.

(6) The Supreme Court of the State of Washington erred in considering and in basing its decision upon the evidence of the Auditor of the Department of Public Works as to the expense incurred by the Department in supervising and regulating railroads, since such evidence was pure hearsay and was inadmissible for the purpose of determining the rights asserted by the appellant under the Federal Constitution.

(7) The Supreme Court of the State of Washington for each of the reasons contained in the foregoing assignments, erred in reversing the judgment of the Superior Court of Thurston County, and in directing that appellant's action against the appellee be dismissed. (Tr. 106-109.)

SUMMARY OF ARGUMENT

I.

Chapter 107, Laws of 1929, violates Section 8, Article I, and the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution and is void on its face, because:

(a) The tax is not imposed for nor limited by the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies to pay the expenses incurred by the Department in regulating them all, in the aggregate; and

(b) The tax is imposed on railroad companies and a variety of other unrelated utility companies to pay the expenses of all of the duties and activities of the Department of Public Works, whether regulatory and supervisory in their nature, or administrative, police or judicial, and whether or not such activities have any relation to the business of the respective taxpayers.

II.

The Act is void because its operative effect upon the appellant has been to create a commingled fund from the fees paid by railroads and other public utility corporations and other receipts of the Depart-

ment, far in excess of the expenditures of the Department, and to make it impossible to determine the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utilities, or separately from the expense of the non-regulatory activities of the Department concerning railroads.

(a) The burden of proof was on the State to show that the fees collected from the railway companies under the act were not in excess of the reasonable cost of their regulation and supervision;

(b) This burden of proof was not met because the only competent evidence in the record, consisting of the official reports of the Department of Public Works and the Governor of the State, shows that a large surplus was collected by the Department under the act and from other sources provided by law and commingled in one common fund, so that it was impossible to determine the expense of regulating and supervising railroads;

(c) The only evidence opposing this conclusion was that of the Auditor of the Department of Public Works, which was inadmissible and incompetent under all rules of evidence and was so held by both the

trial court and the State Supreme Court, but was nevertheless made the basis of the State Supreme Court's holding "that the evidence preponderated against the findings made by the trial court" as to the cost of supervising and regulating railroads;

(d) This court will examine the State Supreme Court's finding to see whether it has substantial support in the evidence. So examined it discloses the lack of any support whatsoever.

ARGUMENT

I.

Chapter 107, Laws of 1929, violates Section 8, Article I, and the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution and is void on its face, because:

(a) The tax is not imposed for nor limited by the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies and many unrelated utility companies to pay the expenses incurred by the Department in regulating them all, in the aggregate; and

(b) The tax is imposed on railroad companies and a variety of other unrelated utility companies to pay the expenses of all of the duties and activities of the Department of Public Works, whether regulatory and supervisory in their nature, or administrative, police or judicial, and whether or not such activities have any relation to the business of the respective taxpayers.

Chapter 107, Laws of 1929, consists of but one section and requires every corporation, etc., "engaged in business as a public utility and subject to regulation as to rates and charges by the Department of Public Works, except auto transportation and steamboat companies holding certificates under Chapter 248, Laws of 1927," to file with the Department on or before April 1st annually a sworn statement showing its gross operating revenue for the preceding calendar year and pay to the Department a fee of 1/10 of 1% thereof.

Section 2 of Chapter 113, Laws of 1921, provides that all sums collected by the Director of Public Works under the provisions of the act shall be paid to the State Treasurer and by him deposited in a fund to be known as the "Public Service Revolving Fund."

Sec. 10344 of the public service commission law defines the terms used in Chapter 107. The term "public service company" is defined as follows:

"Every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman as such terms are defined in this section."

"Common carriers" are defined as:

"All railroads, railroad companies; street railroads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation, etc., operating, etc., any such agency for public use in the conveyance of persons or property for hire within this state."

Each of the enumerated companies is required to pay 1/10 of 1% of annual gross revenue to the State Treasurer by him to be paid into the public service revolving fund. The revolving fund is a general state fund subject to appropriation by the legislature for any and all purposes, although customarily appropriations for support of the Department's manifold activities are made from that fund in a lump sum "*not to exceed* fees heretofore or hereafter collected" and paid into the revolving fund. See Laws 1931, Chapter 144, page 466, and Laws 1933, Chapter 192, page 903, Appendix B.

The duties of the Department of Public Works are described in Findings III (Tr. 39, 40), X (Tr. 46, 47) and X-B (Tr. 47, 48), as follows:

"III.

The Department of Public Works of Washington is an administrative tribunal, with three members, namely, a director and two supervisors, with the usual powers of regulation and supervision of railroads and other public utilities, and is charged with the performance of a variety of duties, other than

those pertaining to railroads and utilities. It is divided into two divisions, known as the 'Division of Transportation' and 'Division of Public Utilities'. The Division of Transportation is under a "Supervisor of Transportation' and the Division of Public Utilities is under a 'Supervisor of Public Utilities'. The Director of the Department has general supervision of all its activities. The Supervisor of Transportation is concerned specially with railroads, water carriers, street railways and other transportation agencies. The Supervisor of Public Utilities is concerned specially with telephone and telegraph companies, electrical companies, gas companies and other public utilities.

"The jurisdiction of the Department of Public Works is summarized in its Annual Report to the Governor for the period ending December 1, 1932, to November 30, 1933, introduced in evidence in this case on page 5 thereof, as follows:

" 'Jurisdiction of Department

The regulatory powers of the State of Washington are exercised over telephone and telegraph companies, light and power companies, water and irrigation companies, gas companies, docks, warehouses, ferries and other water, freight and transportation companies, railroads, street railways, auto, passenger and freight transportation companies and all trucks engaged in transporting property outside city limits for compensation, or sold or to be sold in the performance of a commercial enterprise, or for lease, rent or bail. In addition the Department has jurisdiction over railroad crossings and the inspection of railroad scales'."

"X.

In addition to its supervisory and regulatory duties relating to railroads said Department is required by law to perform various other duties and functions

relating to railroads of a non-supervisory and non-regulatory nature; in particular, the Department has the duty of prosecuting or defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction. It pays all of its expenses incurred in the discharge of those functions and duties out of said filing or report fees paid by railroad companies and public utilities. Shippers and the public generally who are parties to or are or may be benefited by said proceedings before the Interstate Commerce Commission pay no portion of the expenses of said proceedings and no fee or tax is imposed upon them for that purpose, although all such parties, including plaintiff, are taxed on their property upon an ad valorem basis to defray governmental expenses. The following is quoted from page 1 of the Department's report to the Governor for the year 1930 and is illustrative of its functions in this particular, to-wit:

"'An important part of the duties of the Department of Public Works is that of seeking relief before the Interstate Commerce Commission in matters of interstate rates where they adversely affect citizens of Washington. It also participates in other rate cases when the matter involves conditions or activities in this state. The Department during the past year participated in many proceedings before the Interstate Commerce Commission. The following include the more important matters with which it was engaged:'

"The report follows with the particulars of the activities of the Department in connection with matters pending before the Interstate Commerce Commission wherein it appeared and took part as a litigant and in an advisory capacity to the Interstate Commerce Commission, in some instances lining up on the same side as the railroads operating in this state, including plaintiff, in other instances taking the opposite

side, and in still others taking sides as between railroads operating in this state. In one case in particular before the Interstate Commerce Commission in which the Department of Public Works appeared on behalf of the State of Washington in a contested case which resulted in a lengthy hearing and later in proceedings in the courts was involved the question whether the Interstate Commerce Commission could order the construction of a cross-state railroad line in the states of Oregon and Idaho. (See pp. 4 and 6 of 1929 and 1930 Annual Reports of Department, introduced in evidence as Exhibits 9 and 8, respectively, under title on said pages 'Railroad Extension Between Homestead, Oregon, and Lewiston, Idaho.') The Department incurred a large expense in said non-regulatory and non-supervisory activities, but no account is required to be kept or was kept of the amount thereof and it is impossible to determine the same, and no attempt was made to do so on the trial of this case."

"X-B:

The Department of Public Works has also undertaken to act in a judicial capacity in overcharge and reparation cases filed in that department by shippers against railroads, including plaintiff, and has held hearings, taken testimony and made and entered awards in many of such cases in favor of the shippers and against the railroads, including plaintiff. Said Department pays and has paid all of its expenses incurred in such reparation cases out of said Filing or Report Fees paid by the railroad companies and public utilities. In the year 1929, 14 of the formal proceedings before said Department were against railroads to recover on overcharge or reparation claims. In the year 1930 there were 22 such cases before the Department; in the year 1932 twenty; and in the year 1933, 30. (See pp. 3-16 of 1929 Annual Report, Exhibit 9; pp. 5-18 of 1930 Annual Report, Exhibit

8; pp. 22-36 of 1932 Annual Report, Exhibit 6, and pp. 13-42 of 1933 Annual Report, Exhibit 5.) The number of such cases for the year 1931 was substantially the same. Plaintiff's railroad is taxed in the State of Washington, and was so taxed during the years 1929 to 1933, inclusive, under and by virtue of Chapter 130, Washington Special Session Laws 1925, on its fair market value considered as a going concern, including all of its property, real, personal and mixed, and all of its rights and franchises of every kind and nature whatsoever. During said years 1929 to 1933, inclusive, in addition to said ad valorem taxes, the plaintiff also paid said fees to the Department of Public Works under Chapter 107, Laws of 1923, while no such fees to the Department of Public Works were paid or are required to be paid by statute by said shippers who were parties to said overcharge and reparation proceedings. The Department incurred a large expense in said overcharge and reparation cases, but no account is required to be kept or was kept of the amount thereof, and it is not only impossible to determine the cost of such cases to the Department, but no attempt was made to do so in the trial of this case."

It is well settled, of course, that the state may impose on a railroad, or other utility corporation, the cost of its necessary regulation and supervision. It was so held in *Charlotte, etc., Railroad Company v. Gibbes*, 142 U. S. 386. In that case a statute of South Carolina created a railroad commission with the usual powers, and provided that the entire expense of the commission should be borne by the railroads of the state in proportion to gross revenue. The act was sustained on the theory that regulation was necessary

in the interest of the public and "when exercised through commissioners, their services are for the benefit of the railroad corporations as well as of the public." Where limited to the reasonable expense of proper supervision and regulation, there is "no encroachment upon the 14th Amendment." But it is otherwise if the tax should be levied to pay for services "in no way connected with the railroads," for, in that case, there would be a violation of due process of law, the railroads being otherwise taxed on the value of their property, as of course they are in Washington (Finding X, Tr. 48). The *Gibbes* case, while authority for upholding a tax on railroads to pay the cost of their regulation and supervision, is also authority for saying that a tax levied on railroads to defray the expense, in whole or in part, of regulating other unrelated corporations, violates the due process clause of the 14th Amendment.

The *Gibbes* case is followed in *New York v. Squire*, 145 U. S. 175, and the question was again before the court in *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, and *Postal Telegraph-Cable Co. v. New Hope*, 192 U. S. 55. In the *Philadelphia* case the city imposed a fee of $1.00 per pole and $2.50 per mile of wire to pay cost of inspection and brought action to recover. The court held that a city has power to require a reasonable fee for local supervision and in-

spection, but that the power must be exercised in reason and only a necessary charge imposed, and the amount must be limited to the cost of the particular service rendered, and the supervision must be regulatory in character. In *Postal Tel. Co. v. New Hope* the action was to recover certain inspection fees from the Telegraph Company. The ordinance was upheld, but because the jury returned a verdict for less than the amount provided, the judgment was reversed on the ground that the question was whether the fee imposed was reasonable; if not, the verdict should have been for defendant. Neither court nor jury, said this court, had a right to substitute its judgment as to what was reasonable and to give a verdict for that sum, as to do so would be an invasion of the legislative province.

The principle of all of the cases is that a corporation which so conducts its business as to require inspection and supervision may be charged with the cost thereof, but cannot be charged in excess of the cost, nor with the cost of regulating other and unrelated activities; nor with the cost of activities which are not of a regulatory or supervisory character, even though incidental to the regulated business.

Foote & Co. v. Stanley, 232 U. S. 494, is directly in point. That case condemns a Maryland statute providing for inspection of oysters and prescribing a fee

of 1c per bushel. The act provided that the fund should be drawn on "for the purpose of maintaining sufficient and proper police regulation for the protection of fish and oysters in Maryland waters, and in the payment of officers and men, and keeping in repair and supplying the necessary means of sailing the boats and vessels of the state fishery force."

Reversing the state court, this court held that inspection is usually intended to determine weight, quality, etc., and accomplished by weighing or looking at the articles, and then said:

"But while the two duties may sometimes overlap, there is a difference between policing and inspection, and if the state imposes upon one set of officers the performance of the two duties, and pays the whole or a part of the joint expenses out of inspection fees, it must be made to appear that such tax does not materially exceed the cost of inspection,—the burden in such cases being on those seeking to collect the combined charge. For if the cost of inspection is so intermingled with other expenses as to make it impossible to separate the two, interstate commerce might be burdened by fees collected both for inspection and revenue,—for a lawful and for an unlawful purpose."

So it is in the case at bar that the act imposes a flat fee of 1/10 of 1% of gross annual revenue on many unrelated corporations to pay the expense incurred by the Department in regulating all of them; and imposes a flat fee on all of the corporations for the purpose of defraying the cost incurred by the

Department in discharging its manifold duties, some of which are of a supervisory nature and many others of an administrative and judicial nature. With respect to many of these duties the Department does not discharge supervisory functions in so much that they might just as well be imposed upon some other state officer or department who has no duty whatever with respect to railroads and other utility corporations.

The opinion in the *Foote* case proceeds to point out that the statute imposes on the fishery force many duties with respect to patroling the waters and enforcing various police regulations, commingled with the duty of inspection, the expense whereof is to be paid out of the inspection fee. Therefore, says the court, the law is void on its face for raising more revenue than necessary for inspection:

"The unreasonableness of inspection fees may appear from the language of the act, as in D. E. Foote & Co. v. Clagett, 116 Md. 228, 81 Atl. 511, where a charge of 2 cents a bushel on oysters was collected, under a statute which provided that one-half was to be used for inspection and the other half was to be used for replacing shells on the natural beds for the purpose of increasing the oyster crop. That law was declared void by the court of appeals of Maryland, because of the provision that one half of the inspection fee should be applied to other than the inspection purpose. The present statute contains language susceptible of the same construction, for it provides for

an inspection fee of 1 cent per bushel to be 'levied to help pay the salary of the inspectors and the other expenses of the State Fishery Force.' "

The *Foote* case is cited and followed in *Lugo v. Suazo*, 59 Fed. (2d) 386, where the court of appeals for the first circuit invalidates a Puerto Rico act imposing on foreign coffee a fee of 2 cents a pound to be paid into the Insular Treasury as a "Coffee Protection Fund," devoted to defraying the expenses of enforcement of the law for protection of Puerto Rican coffee and for inspecting and guaranteeing the origin thereof. Citing and following the *Foote* case, the court recognizes two rules, stated in the first and second head notes as follows:

(1) Where inspection act fixes fees to cover only inspection expense, presumption is that fees are reasonable, and burden of showing contrary is on one asserting invalidity of act.

(2) Where alleged inspection statute directs that inspection fees shall be devoted to defraying other expenses as well as inspection expenses, presumption is that fees fixed are unreasonable and burden of establishing contrary is on one asserting validity of act.

The *Foote* and *Lugo* cases are in accordance with the general rule with respect to the burden of proof

in such cases, which is that while plaintiff, seeking recovery on the ground that a tax was excessive, must show the amount of taxes which he would have been obliged to pay had he been legally and properly assessed, that rule does not apply where the illegalities are such that it is impossible to ferret out the legal from the illegal taxes. Where the ground of the objection is that the tax was levied in part for an illegal object, it is not necessary for the plaintiff to show how much of the tax was applied to the illegal object. 61 Corpus Juris, Sec. 1243, page 1006; *Solomon v. Oscoda Township*, 77 Mich. 365, 43 N. W. 990; *Gillette v. Hartford*, 31 Conn. 351. In the *Solomon* case, *supra*, the Michigan court say:

"It is urged by defendant that the plaintiff should, but did not, show the excess of taxes which she would have been obliged to pay had she been legally and properly assessed. Such, undoubtedly, is the general rule, but where the illegalities are such that it is impossible to ferret out the legal from the illegal taxes which the tax-payer should pay, the rule does not apply."

State v. Standard Oil Co., 100 Neb. 826, 161 N. W. 537, considers a Nebraska statute providing for inspection of oil and fixing a fee of 10 cents per barrel. The oil inspection department was consolidated with the food, drug and dairy department, for which inspection fees were also imposed. The act was held a

violation of the state constitution, providing for equal taxation, and in violation of the federal constitution as well. The court said:

"Let us add that, while it is within the power of the state, for economy or other reasons, to consolidate departments, as was done here, the Legislature, in fixing its fees for inspection, should so fix them for each department or business that neither can complain that an unfair proportion of the burden of inspection is placed upon it. The guiding rule for the Legislature is to so exercise its discretionary power that the fee established in each business or occupation will, as near as may be, yield an amount not more than reasonably sufficient to pay the cost of inspection in such business or occupation."

The Washington Supreme Court held in the case at bar that nothing appears on the face of the act to indicate that it is unconstitutional, and that it must "be presumed that from the information possessed by it, the Legislature concluded that the amount of the fees as determined by the prescribed rates of percentage was reasonably necessary to meet the cost of supervising and regulating the respective utilities." This conclusion, we submit, is opposed to the decision of this court in *Foote & Co. v. Stanley*, 232 U. S. 494, *supra*. The holding in the *Foote* case clearly is that where a statute levies a flat tax to pay the cost of inspection—a legitimate purpose—and also to pay the cost of other services not in the nature of inspection, the act carries its own proof of invalidity.

The opinion of the Washington Supreme Court makes no reference to the appellant's contention that railroads are taxed by the act under review to defray expense incurred by the Department of Public Works for activities of a non-regulatory character in relation to railroads, such as conducting litigation before the Interstate Commerce Commission in the interest of the shippers of the state, hearing reparation claims and other matters. The findings of the trial court disclose these activities in detail. These findings, based upon the Department's Annual Reports, show that the Department has the duty of prosecuting and defending various rate cases before the Interstate Commerce Commission relating to rates of interstate railroads and to rates of railroads operating in other states and not subject to its jurisdiction; that the Department is required to act in a judiciary capacity in overcharge and reparation cases filed by shippers against railroads; and that the Department incurred large expenses in these activities (Findings X and X-B; Tr. 46-48).

The performance of judicial and administrative functions by the various departments of the state government is for the benefit of all the people of the state. The cost of performing such functions by one department cannot constitutionally be imposed upon a selected group of individuals or corporations which

are otherwise taxed like all other people of the state for the purpose of defraying such expenses. Reparation proceedings are judicial, not regulatory, in character. In appearing before the Interstate Commerce Commission the Department of Public Works is exercising an administrative function in the interest of the entire state. The Department recognizes this in its Annual Report to the Governor for the year 1930 (Exhibit 8, page 1):

"An important part of the duties of the Department of Public Works is that of seeking relief before the Interstate Commerce Commission in matters of interstate rates where they adversely affect citizens of Washington. It also participates in other than rate cases where the matter involves conditions or activities in this state. The Department during the past year participated in many such proceedings before the Interstate Commerce Commission." (Tr. 47.)

The Reports of the Department also show that it heard and decided numerous overcharge or reparation claims against railroads in the years 1929 to 1933, inclusive (Tr. 48).

With respect to the nature of reparation proceedings, this court in *Baer Bros. Mercantile Co. v. D. & R. G. R. Co.*, 233 U. S. 479, said:

"That the two subjects of reparation and rates may be dealt with in one order is undoubtedly true (citing cases). But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is

in its nature private and the other public. One is made by the Commission in its quasi judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi legislative capacity, to prevent future injury to the public."

A state law that imposes a fee upon the railroads, which is partly for the purpose of defraying the cost of judicial proceedings, which does not impose a similar fee upon other parties to such proceedings, while the railroads, like other corporations and individuals, are taxed upon their property upon an *ad valorem* basis, is counter to the Fourteenth Amendment to the Federal Constitution, in that it deprives the railroads of their property without due process of law, and denies to them the equal protection of the laws. This was decided in *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S. 386. The court said:

"If the tax were levied to pay for services in no way connected with the railroads, as for instance, to pay the salary of the executive or judicial officers of the state; while railroad corporations were at the same time subjected to taxation upon their property equally with other corporations for such expenses, and other corporations were not taxed for the salaries mentioned, there would be just ground of complaint of unlawful discrimination against the railroad corporations and of their not receiving the equal protection of the laws."

The fact that reparation proceedings result from the operation of railroads certainly does not justify imposing their expense upon the railroads alone, any

more than the cost of maintaining the courts of the state may be imposed exclusively upon the defendants sued therein. Such functions of government are for the benefit of the people as a whole, and the cost thereof must be charged to the people as a whole, or the uniformity clause of the Constitution is violated.

The Washington Supreme Court admits the force of appellant's contention, supported by the cases cited, when it says:

"The mainspring of respondent's contention upon the immediate point is that many of the activities of the department are not supervisory or regulatory in nature but are administrative or judicial in character, and that the utilities cannot be required to pay fees which are used in part to carry on these latter functions. It may be admitted that if taxes, or fees, should be levied to pay for services in no way connected with public utilities, and at the same time such utilities were subjected to direct taxation upon their properties for such purposes equally with other corporations, while the other corporations were not required to pay the prescribed taxes, or fees, then there would be just ground for complaint of unlawful discrimination against such public utilities. But that is not the case here." (Tr. 91, 92.)

The Washington court then proceeds to gloss over the point by merely holding that "in the very nature and necessity of things such regulation must have a broad field, the extent of which must be determined by legislative discretion." Then follows a quotation from *Charlotte C. & A. R. Co. v. Gibbes, supra.* But

we submit that it is of no aid to point out that regulation covers a broad field when, as here, it appears without contradiction that railroads are taxed for the performance of duties outside this admittedly broad field.

Neither does the Washington Court clearly meet appellant's contention that Chapter 107, Laws of 1929, is not imposed for, nor limited by the reasonable cost of supervising and regulating railroads, but is simply a flat fee imposed on railroads and many other unrelated utility companies to pay the expense of regulating them all in the aggregate.

While the State may impose upon a single tribunal a variety of functions, it must also provide that the tax imposed upon each business shall be devoted to supervision and regulation of that business and be not unreasonably in excess thereof. *Foote & Co. v. Stanley, supra.* Other cases, particularly *Mountain Timber Co. v. Washington,* 243 U. S. 219, affirming 75 Wash. 581, and cases in that category, are also in point. In the *Mountain Timber* case the state industrial insurance act was upheld against objection to distribution of cost by classes of industries, the court holding that industries were properly classified with reference to their risk, so that each unit should contribute its just proportion of the loss. But the court

carefully limits the liability of each classified unit to the losses occurring in its own class. It implies that one industry of a different class of risk cannot be required to pay expense of accidents in dissimilar industries. The court says:

> "In short, it cannot be deemed arbitrary or unreasonable for the state, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes *limited to the actual losses occurring in the respective classes of occupation.*" (Italics supplied.)

In other words, the logging industry is required to pay its losses, the construction industry its losses, railroads their losses, etc. The court says that special taxes for regulation and revenue in proportion to special injury attributable to the activities taxed, is not novel, citing the *Bank Guaranty* case, *sub nom. Noble v. Haskell*, 219 U. S. 104, and a number of other cases, including the *Gibbes* case. That the *Gibbes* case is cited in the *Mountain Timber* case proves that both cases rest upon the same principle.

In *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156, 117 Pac. 1101, the Washington Supreme Court gives many instances showing the principle upon which the validity of such statutes is founded. For example, the statute which provides for collection from vessels of 40 cents per month for each seaman,

to be used for the care of aged seamen; statutes making railroad corporations absolutely liable for fires they set; statutes making landlords liable for loss resulting from intoxication caused by the sale of liquor by lessees; statutes imposing liability upon fire insurance agents for the benefit of a fund to care for sick and injured firemen; and many others of like kind. All of these cases imply that the liability imposed must be on account of the injury or expense occasioned by the industry. No case has ever held that one industry may be held liable for expense occasioned by another industry; nor that oil may be taxed to pay the cost of inspecting hay or grain, and so with each industry or article requiring supervision, regulation or inspection in the public interest.

The *Mountain Timber* case is cited with approval in the *Railroad Retirement* case, decided by this court May 6, 1935, 55 Sup. Ct. Rep. 758. The Retirement Act provides a fund to be contributed by all of the railroad companies for pensioning all of the employes; that is to say, the employes of each company are treated as the employes of all, and the employes of all as the employes of each, without recognition of the different circumstances of each carrier and its employes. The Government cited *Mountain Tim-*

ber Co. v. Washington and *Noble v. Haskell*, and similar cases. The court distinguishes those cases, concluding as follows:

"We conclude that the provisions of the act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets, regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process."

If this be so, how much more flagrant is the violation of due process where railroads and many wholly unrelated corporations are grouped together and made jointly and severally responsible for the cost of regulating one another; and are also made liable for the non-supervisory expenses incidental to the Department's jurisdiction, and as well for expenses of activities which have no relation to any of them.

II.

The Act is void because its operative effect upon the appellant has been to create a commingled fund from the fees paid by railroads and other public utility corporations and other receipts of the Department, far in excess of the expenditures of the Department, and to make it impossible to determine the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utilities, or separately from the expense of the nonregulatory activities of the Department concerning railroads.

In addition to the fees paid under Chapter 107, Laws of 1929, by railroads and public utilities the Department of Public Works receives other fees. The following is a copy of a financial statement on page 79 of the Annual Report of the Department to the Governor for 1933 (Exhibit 5). It is typical of the other years:

"RECEIPTS

	Dec. 1, 1932 to Mar. 31, 1933	Apr. 1, 1933 to Nov. 30, 1933	Total Fiscal Year Ending Nov. 30, 1933
Auto Transportation, gross revenue fees	$ 11,979.37	$ 35,201.53	$ 47,180.90
Auto Transportation, application fees	110.00	1,566.00	1,676.00
Report filing fees	31,395.27	28,397.54	59,792.81
Motor Vehicle Permit, gross revenue fees		8,649.69	8,649.69
Motor Vehicle Permit, application fees		14,750.00	14,750.00
Motor Vehicle Permit, plate fees		6,133.00	6,133.00
Storage Warehouse, gross revenue fees		5.00	5.00
Storage Warehouse, application fees		1,130.00	1,130.00
Scale Test fees	200.00	1,800.00	2,000.00
Utility Overcharge fees	91.13	99.95	191.08
Miscellaneous Fees	701.96	1,739.92	2,441.88
Certified Boat fees	3,536.94	853.86	4,390.80
Special Case Cost fees		3,055.08	3,055.08
Totals	$ 48,014.67	$103,381.57	$151,396.24"

(Finding VII, Tr. 44.)

Prior to the enactment of Chapter 107, Laws of 1929, the cost of operation of the Department of Public Works was paid from three sources,—the general fund, the auto transportation fund and the public service revolving fund.

Thus the Appropriation Act of 1929 (Laws of 1929, ~~Chapter 201~~, Chapter 228, page 640; Appendix B) appropriated from the general fund $124,200 and from the public service revolving fund $188,750. Of course the fees provided by the Act of 1929 were not then available.

The Governor's message to the Legislature of 1929 (Exhibit 11) contained the following recommendation:

"PUBLIC WORKS.

"The cost of operation of the Department of Public Works is now paid from three sources—the general fund, the auto transportation fund, and the public service revolving fund. The motor vehicle division is entirely self-supporting, all expenses being paid from the auto transportation fund, derived from an assessment of one per cent of the gross earnings of all motor stage and freight lines. The *public utilities* and *transportation divisions* should likewise be *self-supporting*, and as to operating costs, the work of this department carried on as a unit.

"It is recommended that the fees now required of public utilities and transportation companies, other than motor, be sufficiently increased so that the department may carry on *all of its activities* without cost to the general taxpayers. It is further recommended that the auto transportation and public service revolving funds be abolished, and all receipts paid into the general fund. There is no more justification for setting up special funds in this department than for an insurance fund in the office of the Insurance Commissioner, a banking or savings and loan fund in the Department of Efficiency, or a lawyers', doc-

tors', or barbers' fund in the Department of Licenses." (Italics supplied.)

The Legislature adopted the Governor's recommendation and enacted the statute now under review. The result was in 1931 an appropriation of $272,000 from the revolving fund and no appropriation from the general fund (Laws 1931, Chapter 144, page 466; Appendix B).

In 1933 there was again no appropriation from the general fund, but there was sufficient in the revolving fund for the Legislature to appropriate therefrom for salaries, wages and operations of the Department $180,850, and for "special investigation and valuation " $250,000 (Laws 1933, Chapter 192, page 903; Appendix B).

The occasion of the appropriation for "special investigation and valuation" was the passage of three drastic statutes by the 1933 Legislature for the additional supervision, regulation and dictation of the business of power companies, telephone companies and other utilities, excluding interstate railroads (Laws 1933, Chapters 151, 152 and 165).

The accumulation of the amounts paid by railroads and other public utility corporations and other receipts of the Department over the period 1929 to 1933, inclusive, is shown in the Annual Reports of

the Department to the Governor (Exhibits 5, 6, 7, 8, 9 and 13). At the end of 1933, as shown on page 79 of Exhibit 5, there was a surplus in the Department's fund amounting to $224,193.95. This balance was expended by the Department in 1934 in carrying on investigations of and litigation with public utility corporations other than railroads, and with which the railroads were in no way concerned, as clearly appears from the Department's report to the Governor for 1934 (Exhibit 13). In this report the Department said on page 11:

"PENDING INVESTIGATIONS

"The 1933 Session of the Legislature made available to the Department a special appropriation of $250,000 for utility rate and valuation investigations. A large number of these investigations have been taken, and all thereof except those involving the two larger telephone companies and the three larger power companies have been completed, except for the entry of findings and orders in some thereof. These cases have disclosed many glaring abuses and improper practices. They have shown that generally utility properties are greatly overvalued in Washington. The findings in and status of each of these cases is discussed in the accompanying report.

"The task undertaken was large. It required the selection and building up of an experienced and qualified personnel. This personnel is now engaged upon the larger cases aforesaid still pending. These cases are those of the Pacific Telephone & Telgraph Company and its subsidiary the Home Telephone Company of Spokane (with combined book value of prop-

erties of approximately $65,000,000), the Puget Sound Power & Light Company (with book value of electrical properties of approximately $120,000,000), the Washington Water Power Company (with book value of properties of approximately $65,000,000). and the Pacific Power & Light Company (with book value of properties in Washington of approximately $17,000,000). No valuation has ever heretofore been made of the properties of the Puget Sound Power & Light Company. The properties of the Washington Water Power Company were valued in 1917 but this valuation was never kept to date. This company has since 1917 acquired a large amount of additional property, both by purchase and by construction and the 1917 valuation is now wholly useless. Upon request of the Department each of the five companies has prepared and furnished, or is preparing and will furnish, detailed inventories of its property, as well as other information and data with reference to the construction, maintenance, operation and financial history thereof.

"It is expected that the Pacific Power & Light Compay investigation will be completed and hearing thereon commenced about February, 1935, that the Puget Sound Power & Light Company investigation will be completed and hearing thereon commenced about June, 1935, and that the investigation of the Washington Water Power Company will be completed and hearing thereon commenced during the fall of 1935. Preliminary investigations of the Pacific Telephone & Telegraph Company and the Home Telephone Company of Spokane have already been made and preliminary hearings thereon held, at which evidence has been submitted by both the Department's Engineering and Accounting section and by the company. Before these cases can be completed it is necessary that the Department make considerable further investigations and studies which present appropriations do not permit. It is expected that,

appropriations permitting, concluding investigations will be made and hearings held during the ensuing year."

The receipts of the Department from all sources for the period 1929 to 1933, inclusive, were thus shown to be in excess of the expenditures of the Department in the performance of its manifold duties and activities during said period by the amount of $224,193.95. But no separate accounts were kept or required to be kept with the various public utility companies concerned, and as the trial court found, it was impossible to determine what was the expense of regulating and supervising railroads separately from the expense of regulating and supervising other public utility corporations, and it was equally impossible to determine what expense the Department incurred in discharging its functions and duties relating to railroads but not of a supervisory character. The court also found upon the record that the activities of the Department connected with the regulation and supervision of railroads were at all times relatively unimportant and inexpensive in comparison to the time devoted to and the cost incurred by the Department in regulating and supervising auto transportation companies and motor vehicle operations and telephone, electrical, gas, water and public utility corporations other than railroads, and in its non-

regulatory activities relating to railroads (Findings XI and XII; Tr. 48, 49).

It is entirely clear that the Legislature, following the Governor's recommendation, pursued the plan of taxing the railroads and other public utilities all together, for the purpose of paying *all* of the Department's expenses, no matter how incurred and no matter for what purpose. It is equally clear that a large surplus resulted from this plan for the years involved in this case, and that this surplus was devoted not to the regulation or supervision of railroads, but to the "special investigation and valuation" of power companies and telephone companies.

The legal question presented is simply whether under such a scheme and upon such a record the taxpayer is to be defeated because the fees paid by his class have been commingled with other funds without the provision of any official record or method of accounting to show the disposition of his payments.

The State Supreme Court answered this question by holding that the burden of proof was upon the appellant to make a segregation and show the excessiveness of the tax imposed upon the railroads and that "not having met the burden imposed upon it the respondent (appellant here) did not make a case for relief."

This holding was directly contrary to the rule announced by this court, that the burden of proof in such cases is upon those seeking to collect the combined charge. *Foote & Co. v. Stanley*, 232 U. S. 494, *supra.*

The Washington court then "going even beyond" its misplacement of the burden of proof, adverted to certain testimony of the auditor of the Department of Public Works and held that even if the State had the burden of proving that the fees collected from the railroads did not exceed the cost of their proper supervision and regulation, "the evidence preponderated against the findings made by the trial court as to the cost of supervising and regulating railroads."

This evidence was offered after both parties had rested and the case had been formally closed (Tr. 71), It was objected to as hearsay (Tr. 74), but was admitted by the trial court because he "didn't want the case to come back here." (Tr. 82.) It was in substance to the effect that at the auditor's request and not as a matter of duty, each employe of the Department "each month" handed him a slip "prorating his salary for the month to each class" of utility, and that this apportionment showed that the cost of "the railroad part of the Department of Public Works" exceeded the amount of the fees paid

by the railroads under the act of 1929. On cross-examination the auditor testified:

"Q. When did you make these figures?

A. I started making the figures around 1924; however, these are later figures. These figures I have compiled, the latter part of them, within the last month I should judge.

Q. These accounts were not kept currently from year to year?

A. Yes, I had them in the files in case I needed them.

Q. Why did you make them?

A. Originally, I made them before the one-tenth of one per cent law went in, to see about how the expenses were running between the various classes of utilities.

Q. Who furnished you the figures from which you made these compilations?

A. As to salaries, they were furnished by each individual. Each month, an individual turns in a slip to me prorating his salary for the month to each class.

Q. Something he did himself?

A. Yes.

Q. For himself?

A. Yes.

Q. Do you know whether he correctly prorated them or not?

A. No.

Q. It was no part of his official duties to make a prorata?

A. No, it was a request by me, and I checked to see they were turned in each month.

Q. Those figures were not required by any law to be kept?

A. No, not even by the department.

Q. Just some private memoranda you kept for your information?

A. For the information of the Department if it should ever be needed.

Q. What use would the Department have for them?

A. For just such a case as this, is likely to come up at any time.

Q. It was not of use on this class?

A. We had to keep it on motor vehicles and boats, and kept it for this, too.

Q. Because we had a statute on motor vehicles and boats that provided the tax be regulated by costs?

A. Yes.

Q. There was no such statute for railroads or utility companies?

A. No.

Q. They are not official in the sense of any rule, or order or rule of the Department that required them to be kept?

A. No.

Q. They are based on the proration of time handed in to you by the various employes of the Department?

A. Yes.

MR. DAPONTE: I move to strike the witness's testimony. It is based on hearsay. It was no part of his duty to keep these figures, and no part of the duty of the men from whom he obtained the figures

to keep them. It is his own private memoranda, kept out of curiosity, apparently, by Mr. Stookey, not official figures at all." (Tr. 73-74.)

On recross-examination the witness testified:

"Q. You have no knowledge of your own whether the figures turned in by the employees are correct or not?

A. No." (Tr. 76.)

As already stated, the trial judge viewed the evidence as immaterial, but permitted its introduction for purposes of the record. The State Supreme Court held that "while the account kept by the auditor was not official, in the sense that, of itself, it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact." (Tr. 106.)

Thus, both state courts held the evidence inadmissible. Yet the Supreme Court indulged itself in the paradox of basing its decision upon this incompetent evidence. It satisfied itself by the device of saying that while the account kept by the auditor was inadmissible, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. But the auditor had admitted clearly and unequivocally that he had no knowledge of his own whether the figures turned in by the employes were correct or not; that his evidence was based entirely on the proration of time handed him by the various employes

of the Department and that it was no part of their duty or his duty to make or keep any such record. Manifestly, therefore, if the record did not qualify as evidence in itself, it could not qualify the auditor "to testify as to the ultimate fact." He had no knowledge other than that arising from the record, and when the record to support his statement was withdrawn his testimony lost its entire foundation. It could not be made the means—as it was by the State Supreme Court—of denying the rights asserted by the appellant under the Federal Constitution.

That the records or memoranda on which the auditor based his testimony were inadmissible, and that his conclusion based exclusively thereon was equally inadmissible, there can be no doubt. The memoranda were not official, but personal; they were not made as a matter of duty to the Department, but merely to satisfy the auditor's personal request, and they were not made contemporaneously with the events supposed to have been recorded,—the time slips were turned in by the month and not by the day. *Wigmore on Evidence,* Sections 1632(1), 1523, 1526; *Bates v. Preble*, 151 U. S. 149; *Vicksburg, etc., R. Co. v. O'Brien*, 119 U. S. 99; *Nicholls v. Webb*, 8 Wheat. 326.

The holding of the State Supreme Court, therefore, that the evidence of the auditor preponderated

against the finding made by the trial court as to the cost of supervising and regulating railroads is completely without support. It has no basis in fact and this court will look through it to the record for the purpose of determining whether the Federal rights asserted by the appellant have been wrongly denied. *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254. In this case the court said:

"In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

Even had the auditor's testimony been admissible it would still, by his own admission, have failed to distinguish between regulatory and nonregulatory activities of the Department with respect to railroads. That much time of its staff was spent by the Department in such nonregulatory work appears from the Department's Annual Reports in evidence. Therefore the State would still have failed to comply with the rule laid down by this court in *Foote & Co. v. Stanley*, 232 U. S. 494, *supra*, that "it must be made

to appear that such tax does not materially exceed the cost of inspection—the burden in such cases being on those seeking to collect the combined charge."

Respectfully submitted for reversal,

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APPENDIX A

For convenient reference there follows a digest of the provisions of the Public Service Commission Law relating to public utilities and railroads subject to the Department's jurisdiction. The fee imposed by Chapter 107, Laws of 1929, is to pay the expenses incurred by the Department in administering these provisions:

Remington's Revised Statutes, Sec. 10344:

Defines the meaning of words and lists the corporations subject to the Department's jurisdiction. They include street railroads, railroads, express companies, common carriers, (which comprise railroads, street railroads, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies); gas plants and gas companies, electric plants and electrical companies; telephone companies, telegraph companies, water companies, docks, wharves; warehouses, wharfingers and warehousemen.

"The term 'public service company', when used in this act, includes every common carrier, gas company, electrical company, water company, telephone company, telegraph company, wharfinger and warehouseman as such terms are defined in this section."

"Common carrier" is defined as follows:

"The term 'common carrier', when used in this act, includes all railroads, railroad companies, street rail-

roads, street railroad companies, steamboat companies, express companies, car companies, sleeping car companies, freight companies, freight line companies, and every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, owning, operating, managing or controlling any such agency for public use in the conveyance of persons or property for hire within this state."

Sec. 10345: All charges of any common carrier shall be just, fair, reasonable and sufficient; every common carrier shall provide adequate facilities.

Sec. 10346: Every common carrier shall expeditiously receive and transport persons and property.

Sec. 10347: Every railroad company shall furnish sufficient cars and shall make equal distribution of cars.

Sec. 10349: Railroad companies shall construct switch connections and provide side tracks for shippers' use.

Sec. 10350: Provides for publication and adherence to tariffs.

Sec. 10353: Provides for filing interstate tariffs with the Department.

Sec. 10354: Prohibits free or reduced transportation.

Sec. 10356: Prohibits discrimination by "any common carrier" in the matter of rates and service.

Sec. 10357: Prohibits unreasonable preference by "any common carrier" to any person or corporation or to any locality or description of traffic.

Sec. 10358: The long and short haul section.

Sec. 10359: Prohibits false billing or underweighing, etc., by a common carrier or shipper.

Sec. 10361: Fixes fares on street railroads.

Secs. 10361-1-2: Relate to certificates of public convenience and necessity for steamboats and provide for annual statements of gross revenues and payment of one-fifth of one per cent and that the Department shall take into consideration all moneys on hand, to the end that the moneys collected shall be neither more nor less than sufficient to cover the cost of regulating or supervising such steamboat companies.

Sec. 10362: Relates to the duties of gas, electrical and water companies and provides that all charges shall be reasonable; that such companies shall furnish safe and adequate service and facilities and prescribe reasonable rules, etc.

Sec. 10363: Provides that gas, electrical and water companies shall file tariffs.

Sec. 10364: Provides that no change shall be made in any form of contract or in any rule relating to any rate, nor in any facility except after 30 days' notice.

Sec. 10365: Requires the published rates to be charged and certain exceptions.

Sec. 10366: Prohibits unreasonable preference by any gas, electrical or water company.

Sec. 10367 et seq. Relate to unjust discrimination.

Sec. 10371 et seq. Relate to telephone and telegraph companies, providing for just and reasonable rates, filing of tariffs, changes in tariffs; that published rates be charged; prohibiting unjust discrimination and undue preference, similarly as provided for common carriers and gas companies.

Sec. 10382 et seq. Relate to duties of wharfingers and make similar provisions as applied to telephone companies.

Sec. 10389: Provides for hearings and order of the Commission with respect to matters relating to common carriers.

Sec. 10390: Makes the same provision for gas, electrical and water companies.

Sec. 10391: For telephone and telegraph companies.

Sec. 10392: For wharfingers and warehousemen.

Sec. 10394: Provides that the Commission may investigate interstate rates and rules for the transportation of persons or property or the transmission of messages or conversations, so far as the state is affected thereby, and when excessive or discriminatory; or in violation of the act of congress, or in conflict with the orders or regulations of the Interstate Commerce Commission, the Department is empowered to apply to the Interstate Commerce Commission for relief. It is under this section that the Department is accustomed to take part in litigation before the Interstate Commerce Commission referred to in its annual reports.

Sec. 10395 et seq. Empower the Department to provide for rules for expediting traffic; and succeeding sections provide for weighing of freight and for track connections; and for investigation of wrecks.

Sec. 10400: Gives the commission power, after a hearing, to order facilities or repairs or changes in the equipment of any common carrier.

Sec. 10406: Empowers the Department to order improvements in gas plants and gas, electrical and water systems.

Sec. 10407: Makes similar provisions for telephone and telegraph companies.

Sec. 10408: For docks, wharves and warehouses.

Sec. 10409: Provides for physical connection and joint rates between telephone and telegraph companies.

Sec. 10410: Empowers the Department to appoint inspectors of gas and water meters.

Sec. 10416: Requires every public service company to file an annual report.

Sec. 10417: Is Sec. 107, Laws of 1929, requiring payment of a fee of 1/10 of 1% and is the act which is attacked in this case.

Sec. 10418: Provides for paying the fees into the revolving fund.

Sec. 10422: Relates to complaints against "any public service company."

Sec. 10423: Provides for hearings, orders and record on the complaint.

Sec. 10424: Provides for suspension of tariffs naming increased rates and for a hearing thereon.

Secs. 10428, 10429 and 10430: Provide for review of the Department's orders, supersedeas and appeal.

Secs. 10433 and 10434: Relate to overcharges and orders for refunds. This section is a prolific source of expensive litigation, as may be seen from the Department's reports.

Sec. 10441: Provides for valuing property "of every public service company". The section is amended by Chapter 165, Laws of 1933, so as to confer more extensive power. Under this section the Department has been for the last two years engaged in valuing the property of public utility companies other than railroads in connection with inquiries which it is conducting into the rates and practices of all of the power and light companies and the telephone companies. (See page 47 of its 1933 report.) Under this section there is practically no limit to the amount which the Department may spend.

Sec. 10442: Provides for summary proceedings to enforce the public service commission law or any order of the Department.

The public service commission law was greatly extended by various statutes enacted by the 1933 session.

Chapter 151, Laws of 1933, extends the Department's jurisdiction to cover supervision, regulation and control of issuance of securities by public service companies, other than railroads.

Chapter 152, Laws of 1933, provides for supervision and regulation of the contracts and practices between public service companies and their affiliated

interests. It is believed that this chapter does not include railroads.

Chapter 154, Laws of 1933, provides for regulation and supervision of storage warehouses and warehousemen.

Chapter 165, Laws of 1933, is a sweeping act giving the Department additional power of regulation of public service companies other than railroads, including budget control. This chapter imposes varied and expensive duties. The cost, of course, is defrayed from the revolving fund. The Department is given the right to assess costs in valuation and rate proceedings to the public service company involved.

Chapter 166, Laws of 1933, extends the jurisdiction of the Department to cover what it estimates to be 20,000 additional motor trucks engaged in hauling property for compensation, or in connection with private or commercial business. This chapter classifies the carriers into certified carriers, contract haulers, for hire carriers and private carriers. Under this chapter the Department has been engaged in hearing thousands of applications for licenses of motor carriers almost constantly during the past two years. (See page 13—1933 report.)

Highway and Railroad Crossings: Under Chapter 30, Laws of 1913, as amended, the Department has the duty of providing protection at railway and highway crossings and to separate grades when practicable.

APPENDIX B.

Following are the statutes of 1929, 1931 and 1933, appropriating money for the Department of Public Works:

"FROM THE GENERAL FUND.

* * * *

For the Department of Public Works:

Operations $124,200.00

FROM THE PUBLIC SERVICE REVOLVING FUND.

Operations $186,750.00

(Not to exceed fees collected)."

(Session Laws 1929, Chapter 228, page 640).

"FROM THE PUBLIC SERVICE REVOLVING FUND.

For the Department of Public Works:

Salaries and wages...$207,000.00

Operations 65,000.00

(Expenditures from

above not to exceed fees heretofore or hereafter collected).

Total for Department of Public Works:..... $272,000.00"

(Session Laws 1931, Chapter 144, page 466).

"FROM THE PUBLIC SERVICE REVOLVING FUND.

For the Department of Public Works:

Salaries and wages...	$145,000.00
Operations	35,850.00
Special investigation and valuation	250,000.00
(Expenditures not to exceed fees heretofore or hereafter collected)	
Total for Department of Public Works.....	$430,850.00"

(Session Laws 1933, Chapter 192, page 902).